Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1908

LEO ROSEN, UTILITY CO-WORKERS ASSOCIATION and MORGAN SWEENEY,

Petitioners,

vs.

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION

Jurisdiction

The statement contained on Page 3 of the Plaintiff-Petitioners' Brief concerning the jurisdiction of this Court is correct.

Counter-Statement of Question Presented

Does the decision of the United States Court of Appeals for the Third Circuit in these cases, which was filed on March 8, 1973 and reported in 477 F.2d 90, also appearing in the Petitioners' Appendix on Page 13a, et seq., conflict with the decision of another Court of Appeals on the same matter?

Statutory Provisions Involved

The statement set forth in the Petitioners' Brief on Page 3 is correct.

Statement of the Case

This litigation started in 1966 and involved several hearings in the District Court and three appeals to the Third Circuit Court of Appeals before reaching its present stage. The litigation revolves around the Pension Plan of the Respondent which, at the time the Civil Rights Act of 1964 became effective, July 2, 1965, provided that male employees could retire at age 65 without reduction but could elect early retirement from ages 60 through 64 with a reduction in pension amount. Females were obliged to retire at age 65, but could also retire at age 60 without reduction. In 1967, effective May 1, the Pension Plan was amended to provide the same retirement provisions for males and females with respect to current service, that is, the same reduction percentages applicable to females who retired early at ages 60 through 64 as applied to the males retiring at the same ages. There was, however, a saving feature in the Plan which provided that with respect to pension credits on account of service prior to

May 1, 1967, there would be no reduction in early retirement pensions for women; the Plan provided for continuing reduction in early retirement pensions for the males concerning pension credits on account of time worked prior to May 1, 1967.

The various stages of litigation resulted in a determination that both Pension Plans were violative of the Civil Rights Act, in that the Plans discriminated against males in favor of females in the pension benefits payable for early retirement under certain circumstances. The third Circuit Court of Appeals so held in its decision filed March 8, 1973 and reported at 477 F.2d 90 (13a). None of the parties to this suit took an appeal from this portion of the decision of the Third Circuit Court, and the case was remanded to the District Court for the determination of damages.

On remand, the cases were pre-tried before the trial judge and it was agreed that there were no factual issues to be determined by the trial court (19b) and that the question before the court was one of pure law (19b).

The trial court, following the language of the Third Circuit, found the proper measure of damages to be as follows:

> "Defendant asserts that this language requires this Court to limit the damage award to the differential benefits received by male and female employees for services performed between July 2, 1965 and May 1, 1967. In other words, men who have retired since July 2, 1965 would receive increased benefits henceforth only with regard to pension rights they accrued for work performed during that 22-month period, and would receive no increase in

> benefits for work performed before the effective date of the Act. • • • It is the conclusion of this Court that it is bound by the language of the Court of Appeals, and must therefore embrace defendant's theory of the damage calculation period" (35a et seq.).

An Order for Judgment was agreed upon containing the finding of the Court, including a formula for determination of the damages and a listing of the Union members showing the accumulated damages through December 31, 1974, together with the monthly amounts to be added to future pension payments as a result of the Court's ruling (39a through 46a).

Basically, the net effect of the prior litigation has been to roll back the Company's equalization of early retirement pensions with respect to future service from credits after May 1, 1967 to credits after July 2, 1965, the effective date of the Civil Rights Act. The differences in the early retirement benefits of men and women on account of credits for service rendered and work performed prior to July 2, 1965, the effective date of Title VII, were maintained. The Petitioners are endeavoring, in their Petition regarding discrimination based upon sex, to make the provisions of Title VII retroactive and to cover pension credits earned by males for service prior to the effective date of the Act. As pointed out in the Argument portion of this Brief, Respondent respectfully submits that retroactive application of the Civil Rights Act is improper under the Law.

REASONS FOR DENYING THE WRIT

ARGUMENT

The decision of the United States Court of Appeals for the Third Circuit in these cases does not conflict with any decision of another Court of Appeals in the same matter and follows the well established cases of this Court on the subject matter involved.

The Petitioners would apply the Civil Rights Act retrospectively to pension credits earned on account of service prior to July 2, 1965, the effective date of the Act.

The Third Circuit Court of Appeals, in the language of its opinion, indicated quite clearly that damages were assessable "on account of service prior to May 1, 1967, the effective date of the revised retirement plan, and after the effective date of the Act" (25a), or in other words, for pension credits earned during the 22-month period following the effective date of the Act.

This ruling, of course, was in accordance with legal doctrine.

On and after July 2, 1965, the effective date of the Civil Rights Act of 1964, discriminatory employment practices were prohibited. Since the provisions of the Act were not specifically made retroactive, it is clear that discriminatory practices which occurred prior to July 2, 1965 cannot constitute a violation of the Act.

Indeed the principle is well established that statutes are held to be prospective in application unless Congress specifically indicates otherwise. *Hassett* v. *Welch*, 303 U.S. 303 (1938).

In this regard in their Interpretive Memorandum of Title VII, Senators Clark and Case, two of the leading supporters of the Act, said of the Title, "Its effect is prospective and not retrospective," and "The principal purpose of the Commission (Equal Employment Opportunity Commission) pressing complaints is to obtain future compliance" *Interpretive Memorandum of Title VII, Senators Clark and Case* 110 Cong. Rec. 7212 (1964). The principle that the Civil Rights Act of 1964 is to be given prospective application only has been recognized in a number of significant instances. In *United States of America* v. *The Sheet Metal Workers International Association, Local Union No. 36 AFL-CIO, and the Local No. 1 of the International Brotherhood of Electrical Workers, AFL-CIO,* 280 F. Supp. 719 (E. D. Mo. 1968), the Court stated:

> "Such a pattern or practice must be shown to have existed after July 2, 1965, i.e., after the effective date of the Act, because discriminatory actions and conduct which occurred prior to that date cannot constitute a violation of the Act."

Further in *Dobbins* v. *Local 212, Int. Bro. of Electrical Workers,* 292 F. Supp. 413, 445 (S.D. Ohio, 1968) the Court stated "Pre-Act discrimination does not furnish the basis for any relief under Title VII."

The doctrine that pensions are wages has been well established under the law. In the case of *Inland Steel Co.* v. *National Labor Relations Board,* 170 F. 2d 247 (7th Cir. 1948); cert. denied, 336 U.S. 960 (1949) at page 253, the Court stated:

> "Assume, however, that such supposed payments are made to employees as a result of a company obligation contained in a plan or program. Such

> an obligation would represent a part of the consideration for services performed, and payments made in the discharge of such obligations would, in our view, be 'wages' or included in 'conditions of employment'."

The ruling that pension credits are in the nature of wages continues to be manifest in the decisions of the National Labor Relations Board. *Administrative Decision of the General Council (NLRB), Case No. F-611 (9/11/58).*

The Courts have consistently held that the award of the restitution of back pay to remedy the effects of discriminatory practices under Title VII cannot include back pay on account of service prior to the effective date of the Act. As stated in a recent comprehensive review of this area of the law in the *Rutgers Law Review,* Back Pay Awards under Title VII of the Civil Rights Act of 1964: "Moreover, back pay cannot be awarded prior to July 2, 1965, the effective date of the Act since the Act is prospective only." *Rutgers Law Review,* Volume 26, Number 4, Page 760, (Summer 1973). This principle was supported in *Local 189, United Paperworkers* v. *United States,* 416 F.2d 980, 987 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970); *Meat Cutters, Local 340* v. *Safeway Stores, Inc.,* 4 F.E.P. Cas. 510 (D. Kan. Feb. 4, 1972).

In *Bowe* v. *Colgate-Palmolive Co.,* 416 F. 2d 711 (7th Cir. 1969), the Court in determining the permissible period for back pay awards for female employees who had been discriminated against in work assignments stated:

> "Each class member should be allowed differential back pay for *all the time she worked from the effective date of Title VII* until the beginning of the new test period." (*Emphasis supplied*).

Similarly, with respect to the issue of back pay, the Court of Appeals in *Head* v. *Timken Roller Bearing Co.*, 486 F. 2d 870 (6th Cir. 1973) stated at page 875:

> "On this issue *we are concerned only with a time period* beginning July 2, 1965, the effective date of Title VII, and ending November 4, 1968, the termination date of Timken's unit or departmental seniority system." (*Emphasis supplied*).

The above cases confirm the intent of Congress at the time of the enactment of Title VII to limit restitution of back pay by the Courts to the time period subsequent to the effective date of the Act. In addition, in furtherance of its purpose Congress expressed its intent to avoid windfall damage awards and to avoid harsh and sometimes unbearable economic burdens on employers by passing the 1972 amendment to Title VII, 42 U.S.C. 2000e-5 (g), limiting back pay liability to not more than two years prior to the filing of charges with the Equal Employment Opportunity Commission. Said paragraph 5(g) of the Statute as now amended reads:

> "(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. *Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union, or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled, or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a)." (*Emphasis supplied*).

The Pension Plan of Public Service Electric and Gas Company, for many years past, has been an essential part of every collective bargaining agreement negotiated between the Company and Labor Unions representing its employees. Improvements in pension benefits and eligibility therefor were regularly included in each new or renewed labor contract, and the cost of such improvements was a matter of collective bargaining treated as a wage cost and as part of a total package settlement. The actuarial costs of pension improvements were discussed with the Unions as part of each contract. The Pension Plan, which originated in 1911, was an integral part of the Company's plan of compensation and was so accepted by the Unions. Booklets describing the Plan were regularly distributed to all employees.

In conformity with the doctrine laid down in the *Inland Steel* case, *supra,* which ruled that pensions were wages

and therefore subject to collective bargaining, pension benefits for company employees were accrued year by year in accordance with provisions of the Plan. The intent of Congress to limit the restitution of back pay clearly applies to all compensation, irrespective of the form of payment, and must necessarily include pension benefits.

Thus, in this case the awarding of damages with respect to pension benefits cannot include differences in the benefits of men and women on account of service rendered prior to July 2, 1965, the effective date of Title VII. The key factor is the employee's time of service, not his date of retirement. This conclusion is inescapable irrespective of the time of receipt of pension benefits, that is, retirement occurring before or after the effective date of the Civil Rights Act, and as pointed out before, this Court has so determined.

The first case cited by the Petitioners in their Brief to support their contention that there is a conflict between the decision in the instant case and decisions of other Circuit Courts is the case of *Chastang* v. *Flynn and Emrich Co.,* 337 F. Supp. 807 (D. Ct. Md. 1972); 365 F. Supp. 957 (D. Ct. Md. 1973); Aff. in part, rev. in part, ——F.2d —— (4th Cir., June 10, 1976). At the time of the preparation of this Brief, this case has not been officially reported, but is contained in the Petitioners' Appendix starting at page 119a. The Fourth Circuit recognizes that the Act should not be applied retroactively, but holds that because of special facts in the *Chastang* case their findings were not a retroactive application of the Act. *"The invalidation of the discrimination involved no retroactive application of the Act"* (128a) (emphasis supplied).

The differences between the *Chastang* case and the cases presently before the Court are numerous. In the *Chastang* case, "the fund's annual statements and its advice to each participant of his interest in the fund" . . . indicated . . . "the proportionate interest . . . to which they would be entitled if they retired at normal retirement age. The reduction of their interest occurred by invoking the forfeiture provisions which became effective upon their early retirement" (127a). Furthermore, *"forfeiture was selective—males under certain conditions could receive full benefits upon early retirement—so that whether the forfeiture was to be invoked could not be determined until the time of retirement"* (128a) (emphasis supplied). Further, "the fund in effect received a windfall which did not affect the rights of any former Company employees who retired prior to the effective date of Title VII" (128a). In fact, the *Chastang* case did not deal with a pension plan, but with a profit sharing fund wherein portions of the profits were periodically allocated to the employees, to be paid upon retirement.

The individual participant in the Public Service Pension Plan, at the time he rendered his service, earned a fixed benefit stated in the Plan payable upon early retirement; the amount of such early retirement benefit was not dependent upon subsequent events. In *Chastang* the amount of early retirement benefit payable to the participant was not fixed at the time service was rendered, but rather reflected and was dependent upon subsequent events.

Thus, there was no retroactive application of the Act in either the *Rosen* or *Chastang* cases. In both *Rosen* and *Chastang* the Courts awarded redress for damages only on account of unlawful discrimination resulting from events which occurred subsequent to the effective date of the Civil Rights Act.

See also *Robinson* v. *Lorillard Corporation,* 444 F.2d 791 (4th Cir.), cert. denied, 404 U.S. 1006 (1971), which

held that the Civil Rights Act of 1964 does not prohibit or provide a remedy for acts of discrimination which occurred prior to July 2, 1965 (p. 795).

In the Public Service Pension Plan, the cost of early retirements at better than actuarial equivalent reductions in the cases of both males and females was included in the total costs on an hourly wage basis of collective bargaining settlements. There was no actuarial gain in the case of male early retirement because such payments were fully anticipated in the annual costing of the Plan.

On the contrary, to award a damage settlement on the basis argued by Petitioners would create additional unanticipated liabilities resulting in a substantial actuarial deficit which would reduce pension security for all participants under the Plan, both active and retired. This dilution of the interests of other participants by granting of windfall benefits to a few would be unconscionable.

The second case cited by Petitioners is *Stopford* v. *Boonton Molding Co.*, 56 N.J. 169, 265, A.2d 657 (1970). However, this case is concerned with the right of a company to terminate its funded, *contributory pension plan,* and to cease *the payment of benefits to an employee already retired.* There is no mention in the *Stopford* case of differing benefits to men and women. The Court characterized this pension plan as "an offer to pay a pension upon compliance by the employee with terms and conditions set forth therein", and the Court states, "Satisfaction of those requirements constituted adequate consideration and brought about a vesting of the right of lifetime benefits". The Public Service Pension Plan, for many years before the enactment of the Civil Rights Act, having been the subject of collective bargaining on an actuarial basis which assumed that certain numbers of male and female employees would retire early, was a great

deal more than "an offer to pay" upon "satisfaction of . . . requirements". Pension credits were accumulated by employees on a year-to-year basis, and in exact meaning of the *Inland Steel* decision, *supra,* represented negotiable compensation accrued from service performed in a given year and deferred as to payment until a later time. No other part of the *Stopford* case is pertinent.

The third case cited is that of *Fitzpatrick* v. *Bitzer,* 390 F. Supp. 278 (D.C. Conn. 1974), Aff. in part, rev. in part, 519 F.2d 559 (C.C.A.2d 1975), cert. granted *Bitzer* v. *Matthews,* Dkt. 75-251 (decided by this Court on June 28, 1976; not yet officially reported and, therefore, made a part of Respondent's Appendix (p. 1b)). This Court, in reversing in part and affirming in part, did not discuss the retroactive aspects of the Civil Rights Act, but decided the case on Constitutional grounds.

Petitioners' final cited case is *Albemarle Paper Company* v. *Moody,* 422 U.S. 405, 95 S. Ct. 2362 (1975); 45 L. Ed. 2d 283, recently decided by this Court. This case did not concern male and female early retirement provisions, but related to back pay awards *after* July 2, 1965 stemming from pre-existing minority hiring practices. The case was remanded to the District Court for determination of possible damage amounts. Mr. Chief Justice Burger, in an opinion concurring in part and dissenting in part, stated "it is undisputed that it (Albermarle) voluntarily discontinued such practices prior to the effective date of Title VII and that the statute does not—and could not—apply to acts occurring before its passage". Further, in a footnote to the majority opinion, Mr. Justice Stewart commented "under Title VII, back pay liability exists only for practices occurring after the effective date of the Act, July 2, 1965 • • •".

The tables on Page 51a, et seq. and those appearing in the Judgment of the District Court, starting on Page 43a, reflect exactly the results of applying the Petitioners' theory of damages to the early retirees.

In claiming damages based upon pension credits earned prior to July 2, 1965, they have managed to show much larger sums of money allegedly due under their theory. In fact, the figures vividly establish the Respondent's argument previously made on page 12 of this Brief, that such an interpretation would create a substantial actuarial deficit in the Public Service Plan, would dilute the interests of other participants, and would jeopardize the ability of the Company to continue the practice of liberalizing and improving pension benefits in the future.

The true magnitude of the actuarial deficit that would be created cannot be appreciated from an examination of the tables starting on pages 51a and 43a of the Petitioners' Brief. The names listed therein are the members of the Utility Co-Workers' Association alone. However, there are approximately 900 other male employees who retired early at reduced pensions, together with additional employees who will retire early in the future, all of whom will be affected by the ultimate decision in these cases. At the Pretrial Conference held in the Trial Court on September 4, 1974, after remand by the Third Circuit Court of Appeals, it was agreed by counsel for Public Service that the final decision on these two cases would be applied to all male employees of the Company who have retired or will retire early (20b, 23b).

The figures on alleged damages in the tables referred to, therefore, are a gross misinterpretation of the magnitude of the unanticipated additional pension liability.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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[APPENDIX FOLLOWS]

APPENDIX

SUPREME COURT OF THE UNITED STATES

Nos. 75–251 AND 75–283

Garland M. Fitzpatrick et al., Petitioners, 75–251 *v.* Frederick Bitzer, etc., et al. Frederick Bitzer, etc., et al., Petitioners, 75–283 *v.* Donald Matthews et al.	On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 28, 1976]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

In the 1972 Amendments to Title VII of the Civil Rights Act of 1964, Congress, acting under § 5 of the Fourteenth Amendment, authorized federal courts to award money damages in favor of a private individual against a state government found to have subjected that person to employment discrimination on the basis of "race, color, religion, sex, or national origin."[1] The

[1] Section 703 (a) of the Civil Rights Act of 1964 (hereinafter the 1964 Act), 78 Stat. 255, 42 U. S. C. § 2000e–2 (a), provides:

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employ-

principal question presented by these cases is whether, as against the shield of sovereign immunity afforded the State by the Eleventh Amendment, *Edelman* v. *Jordan*, 415 U. S. 651 (1974), Congress has the power to authorize federal courts to enter such an award against the State as a means of enforcing the substantive guarantees of the Fourteenth Amendment. The Court of Appeals for the Second Circuit held that the effect of our decision in *Edelman* was to foreclose Congress' power. We granted certiorari to resolve this important constitutional question. — U. S. — (1975). We reverse.

I

Petitioners in No. 75–251 sued in the United States District Court for the District of Connecticut on behalf of all present and retired male employees of the State of Connecticut. Their amended complaint asserted, *inter alia*, that certain provisions in the State's statutory retirement benefit plan discriminated against them because of their sex, and therefore contravened Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U. S. C. § 2000e *et seq.* (1970 ed., Supp. IV). Title VII, which originally did not include state and local governments, had in the interim been amended to bring the States within its purview.[2]

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ment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[2] As relevant here, the definition of "person" in § 701 (a) of the 1964 Act, 78 Stat. 253, 42 U. S. C. § 2000e (a), was amended by § 2 (1) of the Equal Employment Opportunity Act of 1972 (hereinafter the 1972 Amendments), 86 Stat. 103, 42 U. S. C. § 2000e (a) (1970 ed., Supp. IV), to include "governments, governmental agencies, [and] political subdivisions."

The express exclusion of "a State or political subdivision thereof" provided in § 701 (b) of the former was stricken by § 2 (2) of the latter, 86 Stat. 103, 42 U. S. C. § 2000e (b) (1970 ed., Supp. IV). Section 2 (5) of the 1972 Amendments, 86 Stat. 103, 42 U. S. C. § 2000e (f) (1970 ed., Supp. IV), amended § 701 (f) of the 1964 Act, 42 U. S. C. § 2000e (f), to include within the definition of "employee" those individuals "subject to the civil service laws of a State government, governmental agency or political subdivision."

The 1972 Amendments retained the right of an individual aggrieved by an employer's unlawful employment practice to sue on his or her own behalf, upon satisfaction of the statutory procedural prerequisites, and made clear that that right was being extended to persons aggrieved by public employers. See 1972 Amendments, § 4 (a), 86 Stat. 104, 42 U. S. C. §§ 2000e–5 (a)–(g) (1970 ed., Supp. IV).

The District Court held that the Connecticut State Employees Retirement Act violated Title VII's prohibition against sex-based employment discrimination. 390 F. Supp. 278, 285–288 (1974).[3] It entered prospective injunctive relief in petitioners' favor against respondent state officials.[4] Petitioners also sought an award of retroactive retirement benefits as compensation for losses caused by the State's discrimination,[5] as well as "a rea-

[3] Petitioners had also alleged that the retirement plan was contrary to the Equal Protection Clause of the Fourteenth Amendment, but in view of its ruling under Title VII the District Court found no reason to address the constitutional claim. *Id.*, at 290.

[4] In No. 75–251, respondent Bitzer is the Chairman of the State Employees' Retirement Commission, and the other respondents are the Treasurer and the Comptroller of the State of Connecticut. These officials are cross-petitioners in No. 75–283.

[5] Section 706 (g) of the 1964 Act, 78 Stat. 261, as amended, 86 Stat. 107, 42 U. S. C. § 2000e–5 (g), provides in part:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor

sonable attorney's fee as part of the costs."[6] But the District Court held that both would constitute recovery of money damages from the State's treasury, and were therefore precluded by the Eleventh Amendment and by this Court's decision in *Edelman* v. *Jordan, supra.*

On petitioners' appeal,[7] the Court of Appeals affirmed in part and reversed in part. It agreed with the District Court that the action, "insofar as it seeks damages, is in essence against the state and as such is subject to the Eleventh Amendment." 519 F. 2d 559, 565 (1975). The Court of Appeals also found that under the 1972 Amendments to Title VII, "Congress intended to authorize a private suit for backpay by state employees against the state." *Id.*, at 568. Notwithstanding this statutory authority, the Court of Appeals affirmed the District Court and held that under *Edelman* a "private federal action for retroactive damages" is not a "constitutionally permissible method of enforcing Fourteenth Amendment rights." *Id.*, at 569. It reversed the District Court and remanded as to attorney's fees, however, reasoning that such an award would have only an "ancillary effect" on the state treasury of the kind permitted under *Edelman*, 415 U. S., at 667–668. *Id.*, at 571. The petition filed here by the state employees in No. 75–251 contends that Congress does possess the constitutional power under § 5 of the Fourteenth Amendment to au-

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organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission."

[6] See § 706 (k) of the 1964 Act, 78 Stat. 261, 42 U. S. C. § 2000e–5 (k).

[7] Respondent state officials did not appeal from the District Court's finding of a Title VII violation and the entry of prospective injunctive relief.

thorize their Title VII damage action against the State. The state officials' cross-petition, No. 75–283, argues that under *Edelman* the Eleventh Amendment bars any award of attorney's fees here because it will be paid out of the state treasury.

II

In *Edelman* this Court held that monetary relief awarded by the District Court to welfare plaintiffs, by reason of wrongful denial of benefits which had occurred previous to the entry of the District Court's determination of their wrongfulness, violated the Eleventh Amendment. Such an award was found to be indistinguishable from a monetary award against the State itself which had been prohibited in *Ford Motor Co.* v. *Department of Treasury*, 323 U. S. 459, 464 (1945). It was therefore controlled by that case rather than by *Ex parte Young*, 209 U. S. 123 (1908), which permitted suits against state officials to obtain prospective relief against violations of the Fourteenth Amendment.

Edelman went on to hold that the plaintiffs in that case could not avail themselves of the doctrine of waiver expounded in cases such as *Parden* v. *Terminal R. Co.*, 377 U. S. 184 (1964), and *Employees* v. *Department of Public Health and Welfare*, 411 U. S. 279 (1973), because the necessary predicate for that doctrine was congressional intent to abrogate the immunity conferred by the Eleventh Amendment. We concluded that none of the statutes relied upon by plaintiffs in *Edelman* contained any authorization by Congress to join a State as defendant. The Civil Rights Act of 1871, 42 U. S. C. § 1983, had been held in *Monroe* v. *Pape*, 365 U. S. 167, 187–191 (1961), to exclude cities and other municipal corporations from its ambit; that being the case, it could not have been intended to include States as parties defendant. The provisions of the Social Security Act relied upon by

plaintiffs were held by their terms not to "authorize suit against anyone," 415 U. S., at 674, and they, too, were incapable of supplying the predicate for a claim of waiver on the part of the State.

Both parties in the instant case agree with the Court of Appeals that the suit for retroactive benefits by these parties is in fact indistinguishable from that sought to be maintained in *Edelman*, since what is sought here is a damage award payable to a private party from the state treasury.[8]

Our analysis begins where *Edelman* ended, for in this Title VII case the "threshold fact of congressional authorization," 415 U. S., at 672, to sue the State as employer is clearly present. This is, of course, the prerequisite found present in *Parden* and wanting in *Employees*. We are aware of the factual differences between the type of state activity involved in *Parden* and that involved in the present case, but we do not think that difference is material for our purposes. The congressional authorization involved in *Parden* was based on the power of Congress under the Commerce Clause; here, however, the Eleventh Amendment defense is asserted in the context of legislation passed pursuant to Congress' authority under § 5 of the Fourteenth Amendment.[9]

As ratified by the States after the Civil War, that

[8] The Court of Appeals rejected petitioners' arguments that the retroactive benefits would not be paid out of public funds from the state treasury, and that the rule in *Edelman* and *Ford Motor Co.* was therefore inapplicable. 519 F. 2d, at 564–565. Petitioners have not challenged this ruling here.

[9] There is no dispute that in enacting the 1972 Amendments to Title VII to extend coverage to the States as employers, Congress exercised its power under § 5 of the Fourteenth Amendment. See, *e. g.*, H. R. Rep. No. 92–238, 92d Cong., 1st Sess., 19 (1971); S. Rep. No. 92–415, 92d Cong., 1st Sess., 10–11 (1971). Compare *National League of Cities* v. *Usery*, — U. S. — (1976).

Amendment quite clearly contemplates limitations on their authority. In relevant part, it provides:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . . . .
>
> "Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The substantive provisions are by express terms directed at the States. Impressed upon them by those provisions are duties with respect to their treatment of private individuals. Standing behind the imperatives is Congress' power to "enforce" them "by appropriate legislation."

The impact of the Fourteenth Amendment upon the relationship between the Federal Government and the States, and the reach of congressional power under § 5, were examined at length by this Court in *Ex parte Virginia*, 100 U. S. 339 (1880). A state judge had been arrested and indicted under a federal criminal statute prohibiting the exclusion on the basis of race of any citizen from service as a juror in a state court. The judge claimed that the statute was beyond Congress' power to enact under either the Thirteenth [10] or the

[10] "Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"Section 2. Congress shall have power to enforce this article by appropriate legislation."

Fourteenth Amendments. The Court first observed that these Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." 100 U. S., at 345. It then addressed the relationship between the language of § 5 and the substantive provisions of the Fourteenth Amendment:

> "The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative, or judicial. Such enforcement is no invasion of State sovereignty. No law can be, which the people of the States have, by the Constitution of the United States, empowered Congress to enact. . . . It is said the selection of jurors for her courts and the administration of her laws belong to each State; that they are her rights. This is true in the general. But in exercising her rights, a State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent. Nor can she deny to the general government the right to exercise all its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted. Indeed, every addition of power to the general government involves a corresponding diminution of the governmental powers of the States. It is carved out of them.
>
> . . . . .
>
> "The argument in support of the petition for a *habeas corpus* ignores entirely the power conferred upon Congress by the Fourteenth Amendment. Were it not for the fifth section of that amendment, there might be room for argument that the first section is only declaratory of the moral duty of the State . . . . But the Constitution now expressly gives authority for congressional interference and compulsion in the cases embraced within the Fourteenth Amendment. It is but a limited authority, true, extending only to a single class of cases; but within its limits it is complete." 100 U. S., at 345–348.

Ex parte Virginia's contemporaneous recognition of this shift in the federal-state balance has been carried forward by more recent decisions of this Court. See, *e. g.*, *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966); *Mitchum* v. *Foster*, 407 U. S. 225, 238–239 (1972).

There can be no doubt that this line of cases has sanctioned intrusions by Congress, acting under the Civil War Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States. The legislation considered in each case was grounded on the expansion of Congress' powers—with the corresponding diminution of state sovereignty—found to be intended by the Framers and made part of the Constitution upon the States' ratification of those Amendments, a phenomenon aptly described as a "carv-[ing] out" in *Ex parte Virginia*, 100 U. S., at 346.

It is true that none of these previous cases presented the question of the relationship between the Eleventh Amendment and the enforcement power granted to Congress under § 5 of the Fourteenth Amendment. But we think that the Eleventh Amendment, and the principle of state sovereignty which it embodies, see *Hans* v. *Louisiana*, 134 U. S. 1 (1890), are necessarily limited by

the enforcement provisions of § 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.[11] See *Edelman* v. *Jordan, supra; Ford Motor Co.* v. *Department of Treasury, supra.*

III

In No. 75–283, the state officials contest the Court of Appeals' conclusion that an award of attorney's fees in this case would under *Edelman* have only an "ancillary effect" on the state treasury and could therefore be permitted as falling outside the Eleventh Amendment under the doctrine of *Ex parte Young, supra.* 415 U. S., at 667–668. We need not address this question, since, given the express congressional authority for such an award in a case brought under Title VII,[12] it follows necessarily from our holding in No. 75–251 that Congress' exercise of

[11] Apart from their claim that the Eleventh Amendment bars enforcement of the remedy established by Title VII in this case, respondents do not contend that the substantive provisions of Title VII as applied here are not a proper exercise of congressional authority under § 5 of the Fourteenth Amendment.

[12] See n. 6, *supra.*

power in this respect is also not barred by the Eleventh Amendment. We therefore affirm the Court of Appeals' judgment in No. 75–283 on this basis.

The judgment in No. 75–251 is

Reversed.

The judgment in No. 75–283 is

Affirmed.

SUPREME COURT OF THE UNITED STATES

Nos. 75–251 AND 75–283

Garland M. Fitzpatrick et al., Petitioners,
75–251 *v.*
Frederick Bitzer, etc., et al.

Frederick Bitzer, etc., et al., Petitioners,
75–283 *v.*
Donald Matthews et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 28, 1976]

MR. JUSTICE BRENNAN, concurring in the judgment.

This suit was brought by present and retired employees of the State of Connecticut against the State Treasurer, the State Comptroller, and the Chairman of the State Employees' Retirement Commission. In that circumstance, Connecticut may not invoke the Eleventh Amendment, since that Amendment bars only federal court suits against States by citizens of other States. Rather, the question is whether Connecticut may avail itself of the nonconstitutional but ancient doctrine of sovereign immunity as a bar to a claim for damages under Title VII. In my view Connecticut may not assert sovereign immunity for that reason I expressed in dissent in *Employees* v. *Missouri Public Health Dept.*, 411 U. S. 279, 298 (1973): the States surrendered that immunity, in Hamilton's words, "in the plan of the Convention" that formed the Union, at least insofar as the States granted Congress specifically enumerated powers. See *id.*, at 319 n. 7; *Edelman* v. *Jordan*, 415 U. S. 651, 687 (1974) (BRENNAN, J., dissenting); *Parden* v. *Terminal R. Co.*, 377 U. S. 184

(1964). Congressional authority to enact the provisions of Title VII at issue in this case is found in the Commerce Clause, Art. I, § 8, cl. 3, and in § 5 of the Fourteenth Amendment, two of the enumerated powers granted Congress in the Constitution. Cf. *Oregon* v. *Mitchell*, 400 U. S. 112, 131–134 (1970) (Black, J.); *id.*, at 135–150 (Douglas, J.); *id.*, at 216–217 (Harlan, J.); *id.*, at 236–281 (BRENNAN, WHITE, and MARSHALL, JJ.); *id.*, at 282–284 (STEWART, J.); *Katzenbach* v. *Morgan*, 384 U. S. 641, 651 (1966). I remain of the opinion that "because of its surrender, no immunity exists that can be the subject of a congressional declaration or a voluntary waiver." *Employees* v. *Missouri Public Health Dept.*, *supra*, at 300.

I therefore concur in the judgment of the Court.

SUPREME COURT OF THE UNITED STATES

Nos. 75–251 AND 75–283

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Donald Matthews et al.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit.

[June 28, 1976]

MR. JUSTICE STEVENS, concurring in the judgment.

In my opinion the commerce power is broad enough to support federal legislation regulating the terms and conditions of state employment and, therefore, provides the necessary support for the 1972 Amendments to Title VII, even though Congress expressly relied on § 5 of the Fourteenth Amendment. But I do not believe plaintiffs proved a violation of the Fourteenth Amendment, and because I am not sure that the 1972 Amendments were "needed to secure the guarantees of the Fourteenth Amendment," see *Katzenbach* v. *Morgan*, 384 U. S. 641, 651, I question whether § 5 of that Amendment is an adequate reply to Connecticut's Eleventh Amendment defense. I believe the defense should be rejected for a different reason.

Even if the Eleventh Amendment does cover a citizen's suit against his own State,[1] it does not bar an action

[1] As Chief Justice Marshall has pointed out, the Eleventh Amendment is not literally applicable to this situation. See *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264, 412; see also *Employees* v. *Missouri Public Health Department*, 411 U. S. 279, (BRENNAN, J., concurring), 298–324.

against state officers enforcing an invalid statute, *Ex parte Young*, 209 U. S. 123, 159–160. Since the Connecticut pension law has been held to be invalid, at least in part, *Ex parte Young* makes it clear that the federal court properly acquired jurisdiction of the proceeding.

The Eleventh Amendment issue presented is whether the Court has power to enter a judgment payable immediately out of trust assets which subsequently would be reimbursed from the general revenues of the State. Although I have great difficulty with a construction of the Eleventh Amendment which acknowledges the federal court's jurisdiction of a case and merely restricts the kind of relief the federal court may grant,[2] I must recognize that it has been so construed in *Edelman* v. *Jordan*, 415 U. S. 651, and that the language of that opinion would seem to cover this case. However, its actual holding appears to be limited to the situation in which the award is payable directly from State funds and "not as a necessary consequence of compliance in the future" with a substantive determination. 415 U. S., at 668.

The holding in *Edelman* does not necessarily require the same result in this case; this award will not be paid directly from the state treasury, but rather from two separate and independent pension funds. The fact that the State will have to increase its future payments into

[2] Neither the language of the Eleventh Amendment nor the rationale of *Ex parte Young* draws any distinction between proceedings in law or in equity. The Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U. S. Const. Amend. XI.

the funds as a consequence of this award does not, in my opinion, sufficiently distinguish this case from other cases in which a State may be required to conform its practices to the federal Constitution and thereby to incur additional expense in the future. Since the rationale of *Ex parte Young* remains applicable to such cases, and since this case is not squarely covered by the holding in *Edelman*, I am persuaded that it is proper to reject the Eleventh Amendment defense.

With respect to the fee issue, even if the Eleventh Amendment were applicable, I would place fees in the same category as other litigation costs. Cf. *Fairmont Co.* v. *Minnesota*, 275 U. S. 70.

Pretrial Conference and Order

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

LEO ROSEN, et als.,

Plaintiffs,

v.

PUBLIC SERVICE ELECTRIC & GAS COMPANY,

Defendant.

Civil No. 245-66

MORGAN SWEENEY, et als.,

Plaintiffs,

v.

PUBLIC SERVICE ELECTRIC & GAS COMPANY,

Defendant.

Civil No. 955-68

Newark, New Jersey,
September 4, 1974.

Pretrial Conference and Order

Before:
The Honorable HERBERT J. STERN, U.S.D.J.

Appearances:

PARSONNET, PARSONNET & DUGGAN,
Attorneys for Plaintiffs.
By: GEORGE DUGGAN, Esq.

HERMAN H. WILLE, JR., Esq.
Attorney for Defendant.

The Court: This matter has been returned to the District Court by the 3rd Circuit with a published opinion in which the District Court was affirmed on the issue of liability but reversed on its finding that there were no damages.

In its opinion, the United States Court of Appeals for the 3d Circuit directed the District Court to consider the issue of damages and approved the finding of liability. We have conducted a pretrial conference this morning in which the issue has come down basically to one of law. It is the position of the plaintiffs that the law requires that all employees who retired subsequent to July 2, 1965, with equal amounts of seniority shall be treated equally.

The plaintiff points to the fact that there was no vesting of any pension rights by means of monies periodically set aside over the years prior to July 2, 1965, and that, therefore, upon the effective date of Title 7 all men retiring after July 2, 1965, are to receive the same pension as all women retiring subsequent to that date with equal amounts of seniority and pay, irrespective of the fact

Pretrial Conference and Order

that prior to July 2, 1965, there was a different formula applied to the prospective retirements of men and women who were then working with equal amounts of seniority and equal amounts of pay.

The position of Public Service, on the other hand, is that all the law requires and all the 3d Circuit has indicated is proper is that commencing July 2, 1965, all employees, men and women alike, begin to accrue equal amounts of credit towards retirement above that such disparities in credits earned previous to July 2, 1965, in respect to those who had not yet retired as of July 2, 1965, are to be left intact and are unaffected by the passage of Title 7.

The issue, thus, appears to be a pure legal question as to whether or not Title 7 affects the rights of employees who had not yet retired prior to its effective date so as to eliminate disparate formulas, disparate between men and women, which had been operating prior to the effective date of the statute.

Both sides have indicated that there is no question of disputed fact which needs to be resolved by any evidentiary hearing or taking of testimony; that all of the facts involved in the nature of the Pension Program and the nature of the agreements are undisputed. Although either side may point to a particular fact to sustain its legal conclusion, the facts, themselves, are not in dispute.

Accordingly, as I understand it, the parties agree that the question may be submitted as one of pure law to the Court without the need for any resolution of any factual controversy.

It has also been agreed, I believe, that the easiest way to proceed is for the Court to determine this question of

law before going into any accounting. And that based upon the Court's determination of this question of law either party will be given a reasonable time, as contemplated by the Federal Rules of Civil Procedure and appellate procedure to seek review of the Court's determination of the mathematical formula to be applied and that once that has been finalized either in this court or in a superior court all that will remain really is to compute the actual amounts of money involved. The parties have indicated that that they can do, themselves, once the Court has finally decided which measure of damages is to be applied.

The defendant Public Service has also stipulated, as I understand it, that once the courts have with finality—that is, upon the exhaustion of all appeals—once the courts have determined the measure of damages to be applied the construction of Title 7 which comes out of this case shall be applied by Public Service not only to the employees now represented in this lawsuit and before the Court but to all other male employees who are employed by Public Service whether they appear formally before this Court or not.

Upon that representation the Court does not believe it necessary to consider on its own motion whether or not the class of men here represented is broad enough, since upon the representation of the defendant all of its employees will get the benefit of whatever is finally determined by this action.

The Court will, therefore, take this on briefs. The parties are to brief the precise question as it has been defined in this pretrial conference; that is, whether or not Title 7 acts prospectively only or retrospectively, as

well, in terms of those who were still employed as of the effective date of the statute. That is a shorthand way of putting it but I think I have carefully delineated it above.

The parties are also, in the event that no precedent can be found squarely in point under this particular section of law, are to seek any analogies to any other discrimination-type cases in trying to reach a resolution of this difficult question.

As a separate question the parties are to brief their understanding of the meaning of "Footnote 11" in the opinion of the United States Court of Appeals in this controversy. They are to present the Court with their respective interpretations of what the United States Court of Appeals intended and their positions as to whether or not this Court ought to increase the scope of the class pursuant to Rule 23 in respect to women employees of Public Service. There are, therefore, to be two points to be briefed.

Briefs are to be served and filed with the Court and upon adversaries not later than September 25th. Responsive briefs, if desired, to be served upon adversaries and filed with the Court not later than October 9th.

Does that satisfactorily lay out all that needs to be done?

Mr. Duggan: It is minor, but the funding didn't start until 1967. Not 1965.

The Court: I don't think I said it was funded in 1965.

I said that the statute was passed in 1965.

Mr. Wille: Your Honor said it was not funded until prior to 1965.

The Court: It wasn't funded prior to 1965.

Mr. Duggan: Not funded until 1967.

The Court: That is a point of no significance. They will concede commencing in 1965, July 2nd, they must begin to give equal credit. The issue between the parties is whether as to employees still on the payroll after July 2nd, 1965, all employees are entitled under the statute to be treated the same in respect to prior service. I think it had been pointed out that one of the facts to consider was that under the Pension Plan prior to 1965 it was just kind of a formula propounded that there had never been any vesting of monies or setting aside of monies.

Mr. Duggan: There was money set aside that showed up in the Financial Report each year. It was so many million dollars.

The Court: Prior to?

Mr. Duggan: Yes. But it was never set up as a funded —it seems they set it—they would set aside so much to take care of the expenses that would show up in their annual report.

Mr. Lydecker: A so-called book reserve. Quite small. Pensions reserved. Book reserve.

The Court: There is no relation between that and any individual—in other words, it was not a trust fund set up?

Mr. Lydecker: No trust fund.

Mr. Sweeney: No trust fund.

The Court: I don't think that we have to be concerned with that, then. Nobody seems to think so.

All right. Anything else? If you would like to spread anything on the record—

Mr. Wille: Would you like me to make a statement on the record that I concur with the stipulations that you have raised?

The Court: If you would be so kind.

Mr. Wille: On behalf of the Public Service I wish to state that the representation of the Court regarding stipulations of the Public Service that the Pension—pardon me—that the formula would be applied to all male employees is correct.

The Court: I thank you for your cooperation, gentlemen.